No. 80-956

In the Supreme Court of the United States

OCTOBER TERM, 1980

HAROLD H. EMCH, JR. AND ELIZABETH R. EMCH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
ELOISE E. DAVIES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether petitioners' allegation that they were damaged by negligent regulation of a bank by federal banking agencies states a claim under the Federal Tort Claims Act.

2. Whether the district court abused its discretion in denying petitioners leave to amend their complaint to include charges that were not raised before the administrative agencies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 630 F. 2d 523. The opinion of the district court (Pet. App. 13-21) is reported at 474 F. Supp. 99.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22) was entered on September 12, 1980. The petition for a writ of certiorari was filed on December 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 21, 1975, the American City Bank & Trust Company was declared insolvent by the Comptroller of the Currency and was taken over by the Federal Deposit Insurance Corporation (FDIC) acting as receiver. This insolvency rendered worthless approximately 39,480 shares of stock held by petitioners[1] in American Bankshares Corporation, a bank holding company holding 100% of the outstanding shares of the American City Bank. Petitioners filed administrative claims with the Comptroller of the Currency, the FDIC and the Federal Reserve Board (Pet. App. 1-2). The essence of those claims was that petitioners had suffered monetary damages due to the agencies' failure from 1971-1975 "to properly and adequately supervise, examine and control" the American City Bank and to "take proper and adequate measures to preserve and conserve the assets" of the bank (*id.* at 2).

Following the denial of those administrative claims, petitioners initiated this action in the United States District

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[1]The owner of the shares was Harold H. Emch, Sr., who commenced this action but has since died. Petitioners are co-representatives of Emch's estate who have continued the suit. "Petitioners" will be used to refer to the plaintiff in this lawsuit, whether the plaintiff at a particular time was Emch himself or the estate representatives.

Court for the Eastern District of Wisconsin under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. The complaint (Pet. App. 24-31) generally alleged that the United States, acting through the Comptroller of the Currency, the FDIC and the Federal Reserve Board, was negligent "at the operational level" in the regulation and examination of American City Bank and American Bankshares Corporation in the period preceding the bank's insolvency. The district court dismissed the complaint for failure to state a cause of action, ruling that the suit was barred by the "discretionary function" and "misrepresentation" exceptions to the FTCA, 28 U.S.C. 2680(a) and (h) (Pet. App. 16-18).[2] The court specifically rejected (*id.* at 17-18) petitioners' contention that their complaint stated claims relating to agency management of the day-to-day operations of the bank similar to those held actionable in *In re Franklin National Bank Securities Litigation*, 445 F. Supp. 723 (E.D. N.Y. 1978).[3] The district court also denied

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[2]28 U.S.C. 2680(a) and (h) make the Federal Tort Claims Act inapplicable to:

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights * * *.

[3]In that case, the court held that if a federal banking agency exceeded its normal regulatory role and assumed substantial control over the day-to-day operations of a bank, such that the bank and its directors came to rely upon the agency's decisions, the United States could be liable for the negligent performance of those duties. 445 F. Supp. at 728, 731-734. The court also held, however, that negligent performance by

a motion to amend the complaint to assert a "*Franklin National Bank*-type" cause of action on the ground that such a claim was not presented to the administrative agencies (Pet. App. 19-21). See 28 U.S.C. 2675(a).

The court of appeals affirmed (Pet. App. 1-12). The court found that the complaint could not "reasonably be interpreted as stating claims for negligence in the day-to-day operation and management of a bank or bank holding company. Rather, the essence of the claims [was] the allegation of negligent performance of regulatory and statutory supervision or monitoring of the bank entities" (Pet. App. 9-10). Therefore, the suit was barred by the "discretionary function" exception to the FTCA, 28 U.S.C. 2680(a) (Pet. App. 6-7, 10).[4] The court of appeals further held that the district court correctly denied petitioners leave to amend their complaint to encompass claims not made at the administrative level (*id.* at 11-12).

ARGUMENT

1. Petitioners contend (Pet. 5) that this case presents a "question of broad national importance" concerning the applicability of the FTCA to "operational-level negligence" in the course of federal bank regulation. Because the courts below found that no claim of negligent operation of a bank was presented by petitioners' complaint (cf. *In re Franklin National Bank Securities Litigation, supra*), however, the question here is simply whether federal banking agencies' negligent performance of their regulatory duties gives rise

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federal agencies of their normal statutory duties to supervise and examine banks did not give rise to a cause of action against the United States. 445 F. Supp. at 729-731.

[4]Indeed, the court stated that petitioners did not even contend that the negligent performance of the banking agencies' statutory duties gave rise to liability under the FTCA (Pet. App. 7).

to a cause of action under the FTCA.[5] The court of appeals correctly answered that question, and its decision does not warrant review by this Court.

This Court considered the scope of the "discretionary function" exception to the FTCA in *Dalehite* v. *United States*, 346 U.S. 15 (1953). The Court examined the legislative history of the Act and concluded that Section 2680(a) was intended to protect the government "against tort liability for errors in administration or in the exercise of discretionary functions" or, in other words, "liability arising from acts of a governmental nature." 346 U.S. at 27, 28. Contrary to petitioners' suggestion (Pet. 5), the exception is not restricted to broad planning or policy decisions, but extends to the implementation of those policies by subordinates. "Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *Dalehite* v. *United States*, *supra*, 346 U.S. at 36.

Accordingly, it is well established that Section 2680(a) bars a suit under the FTCA for negligent performance of regulatory duties. See, *e.g.*, *First National Bank in Albuquerque* v. *United States*, 552 F. 2d 370, 377 (10th Cir.), cert. denied, 434 U.S. 835 (1977); *Weinstein* v. *United States*, 244 F. 2d 68, 71 (3d Cir.), cert. denied, 355 U.S. 868 (1957). Here, petitioners' claim that the banking agencies failed adequately to control the operation of the bank plainly contemplates that the agencies should have acted differently in exercising their discretion in regulating the

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[5]Petitioners themselves note (Pet. 8) that "the gravamen of [their] allegations deals precisely with the ordinary, though negligent, performance of bank examination and regulation activities by federal agents."

bank. Such a claim is barred by 28 U.S.C. 2680(a).[6] The lower courts thus have uniformly held that an individual may not sue under the FTCA based upon negligent regulation by federal banking agencies. *First State Bank of Hudson County* v. *United States*, 599 F. 2d 558 (3d Cir. 1979), cert. denied, 444 U.S. 1013 (1980); *Harmsen* v. *Smith*, 586 F. 2d 156 (9th Cir. 1978); *In re Franklin National Bank Securities Litigation, supra*; *Social Security Administration Baltimore Federal Credit Union* v. *United States*, 138 F. Supp. 639 (D. Md. 1956). See also *Redmond* v. *United States*, 518 F. 2d 811 (7th Cir. 1975) (SEC regulation).

2. There is similarly no merit to petitioners' contention (Pet. 15-16) that the district court erred in denying them leave to amend their complaint. The court found that the complaint, if so amended, would have stated a claim entirely different from that presented to the administrative agencies, and hence that an essential prerequisite to an FTCA action would have been lacking. 28 U.S.C. 2675(a).[7] The district court would then have been obligated to dismiss the complaint. See, *e.g.*, *Best Bearings Co.* v. *United States*,

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[6]Moreover, to the extent petitioners' claim is based on the government's failure to prevent the issuance of fraudulent reports or to warn them of the bank's financial difficulties, it is barred by the "misrepresentation" exception to the FTCA, 28 U.S.C. 2680(h). A failure to warn cannot be characterized as any tort other than an implied misrepresentation that no problems exist. See, *e.g.*, *Preston* v. *United States*, 596 F. 2d 232 (7th Cir.), cert. denied, 444 U.S. 915 (1979). The issuance of fraudulent bank reports is a misrepresentation by the bank; if the blame for their issuance is ascribed to the government's negligence, the claim is simply one of negligent misrepresentation, which cannot be brought under the FTCA. See *United States* v. *Neustadt*, 366 U.S. 696 (1961).

[7]28 U.S.C. 2675(a) provides in pertinent part: "An action shall not be instituted [under the Federal Tort Claims Act] * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing * * *."

463 F. 2d 1177, 1179 (7th Cir. 1972). Thus, the district court acted properly in denying petitioners' motion to amend the complaint.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
ELOISE E. DAVIES
Attorneys

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